No. 14-86

In the Supreme Court of the United States

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PETITIONER

v.

ABERCROMBIE & FITCH STORES, INC.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

The question presented is whether an employer can be liable under Section 703(a)(1) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, for refusing to hire an applicant based on a "religious observance and practice" only if the employer (i) had "actual knowledge" that a religious accommodation was required, and (ii) the employer's actual knowledge resulted from direct, explicit notice from the applicant. See Pet. i. The Tenth Circuit divided from other courts when it answered in the affirmative.

Respondent says little in defense of the court of appeals' approach, for that approach has little to recommend it. The *source* of an employer's knowledge has no bearing on whether its resulting action is "because of" a religious practice. And an action taken "because of" a religious practice does not cease to be

so when the employer "correctly infers" rather than "knows" that the practice is religious.

Respondent instead spends most of its brief trying to avoid the question presented, misstating the government's position in the process. First, respondent argues for the first time that an employer's refusal to hire an applicant based on a religious practice that the employer could accommodate is not a refusal to hire an applicant "because of" religious practice at all—and therefore does not violate Section 703(a)(1). Respondent implies (and respondent's amicus states outright) that these are simply disparate-impact claims, barred under a different statutory prohibition. But that is at odds with the text of the statute and this Court's precedent, and it obscures the basic differences between the religious-accommodation claims here and disparate-impact claims.

Second, respondent contends for the first time that the compensatory damages the jury awarded are unavailable because religious-accommodation cases do not involve "intentional discrimination" under 42 U.S.C. 1981a(a)(1). Respondent long ago forfeited this argument, which was neither pressed nor passed upon below nor raised in the brief in opposition to certiorari. Nor is there merit to respondent's suggestion that its forfeiture is excused by a purported shift in the government's theory. The government's theory now is just what it has always been—under a failure-to-accommodate theory, respondent violated Section 703(a)(1) and committed "intentional discrimination" within the meaning of Section 1981a(a)(1) when it intentionally refused to hire Samantha Elauf because of her hijab, after inferring correctly that Elauf wore the hijab for religious reasons.

A. The Court Of Appeals Unjustifiably Limited Title VII Protections

1. The court of appeals' approach cannot be justified

As the Equal Employment Opportunity Commission (EEOC) explained in its opening brief (Br. 22-24), when Congress made "religious practice" a protected attribute under Title VII, it prohibited employers from doing what respondent has done here—intentionally refusing to hire an applicant based on what it correctly understands to be the applicant's religious practice, absent a showing of undue hardship. That is because an employer who makes such a hiring decision has refused to hire an applicant "by reason of" or "on account of" the applicant's religious practice, *University of Tex. Sw. Med. Ctr.* v. *Nassar*, 133 S. Ct. 2517, 2527 (2013) (citation omitted). When an employer has intentionally refused to accommodate a religious practice, it makes no difference whether the employer's correct understanding of the religious practice came from the applicant or from elsewhere, and it makes no difference whether the employer "knew" or instead correctly "inferred" the religious nature of the practice. Either way, there is an intentional failure to accommodate. Either way, the employer has done just what the statute precludes.

Respondent offers (Br. 42-56) no textual defense of the court of appeals' limitations on religious-accommodation claims. Instead, respondent tries to cobble together a defense of the ruling below based on precedent, agency construction, and policy.

Precedent is no help. Respondent identifies no case finding Title VII inapplicable to an employment decision that was based on what the employer correct-

ly understood to be a religious practice (other than cases applying the undue hardship exception). On the contrary, as set out in the petition for a writ of certiorari (Pet. 17-22), other courts have found Title VII applicable so long as an employer had "enough information about an employee's religious needs" from any source "to permit the employer to understand the existence of a conflict between the employee's religious practice and the employer's job requirements." *Brown* v. *Polk Cnty.*, 61 F.3d 650, 654 (8th Cir. 1995) (en banc), cert. denied, 516 U.S. 1158 (1996); *Heller* v. *EBB Auto Co.*, 8 F.3d 1433, 1439 (9th Cir. 1993); *Dixon* v. *Hallmark Cos.*, 627 F.3d 849, 856 (11th Cir. 2010); see also *Adeyeye* v. *Heartland Sweeteners, LLC*, 721 F.3d 444, 450 (7th Cir. 2013). Courts have found that standard satisfied based on evidence that employers correctly understood a conflict existed. See *Dixon*, 627 F.3d at 855-856; *Brown*, 61 F.3d at 654.

Nor does the court of appeals' ruling find support in principles of agency deference; the EEOC rejects the Tenth Circuit's approach. See EEOC Br. 30-34. Respondent disparages the EEOC's view as a "litigation-driven" response to this case (Br. 45). That is incorrect. As the EEOC's brief notes (Br. 33), the EEOC has previously explained that employers have Title VII obligations whenever they are "on notice" of the need for a religious accommodation. It has offered as examples of adequate notice cases in which employees provided no explicit verbal notice. See 2 EEOC Compl. Man. § 12-IV(A)(1), at 47 n.120 (July 22, 2008) (*EEOC Compliance Manual*). And in explaining the legal standard, the EEOC has repeatedly stated that "an employer need have 'only enough information

about an employee's religious needs to permit the employer to understand the existence of a conflict between the employee's religious practices and the employer's job requirements.'" *EEOC Compliance Manual* § 12-IV(A)(1), at 47 n.120 (quoting *Heller*, 8 F.3d at 1439); see EEOC Mem. in Opp. to Def's Mot. for Summ. J. at 14-15, *EEOC* v. *GKN Driveline N. Am. Inc.*, No. 1:09CV654, 2010 WL 5093776 (M.D.N.C. 2010) (same standard).

Ignoring what the EEOC has actually said, respondent focuses on what it describes as a "negative implication" from an EEOC regulation noting employers *do* have a duty to accommodate "after an employee or prospective employee notifies the employer" of the need for an accommodation. See Resp. Br. 43-44 (citation omitted) (discussing 29 C.F.R. 1605.2(c)(1)). But such a "negative implication" is hardly appropriate when other guidance expressly states that duties can arise without explicit, verbal notice from an employee. Respondent's claim of inconsistency on the EEOC's part is thus baseless.

Respondent fares no better in its appeal to policy. As the EEOC explained (Br. 24-28), the court of appeals' limitations would undercut the policies at the heart of Title VII. They would permit employers to intentionally refuse the very religious accommodations that Congress sought to require. And they would undermine Congress's objective of promoting "bilateral cooperation" to reconcile religious and workplace needs. *Id.* at 26-27 (citation omitted).

Respondent attempts to justify the Tenth Circuit's verbal-notice requirement by suggesting (Br. 46-48) that an employer who correctly perceives a conflict between work rules and an applicant's religious prac-

tice should have no duty to try to accommodate unless the applicant has "first rais[ed] the issue of religious accommodation" because "[t]he employee will usually be best suited" (Br. 43) to recognize the conflict.[1] As explained in the EEOC's opening brief (Br. 29), however, conflicts between work rules and religious practice will *sometimes* be more easily identified by employers, and *sometimes* by applicants or employees. Respondent's hypothesis that an applicant is more likely to recognize a conflict in "the *typical* case" (Br. 48) is no reason to free employers from the obligation to explore accommodation in the *other* cases (such as this one) where the employer, not the applicant, understands the conflict.

Further, nothing beyond ipse dixit supports respondent's assertion that it takes "a rare coincidence of events" (Br. 48) for the employer to have the superior understanding of a conflict between religious practice and work rules. Many faiths have distinctive garb and grooming requirements, and it blinks reality to suggest that respondent's hiring manager was uncommonly perceptive in recognizing the character of a hijab. Nor is there reason to think most employers outline all their policies during initial job interviews, so applicants may identify possible conflicts from the outset. Cf. *id.* at 55-56 (deriding approach in which employers "recite the entire employee handbook to every job applicant").

Respondent's approach is particularly troubling because whether employers or applicants are most

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[1] Respondent has abandoned the portion of the court of appeals' ruling requiring that this verbal notice come from the applicant or employee. Compare Pet. App. 28a-30a with Resp. Br. 19, 47 n.6.

likely to learn of a religious conflict depends principally on the structure of encounters that are largely within the employer's control. Respondent would provide employers who are disinclined to accommodate religious practice with a ready means to evade the statutory protections, simply by structuring job interviews so that applicants do not learn of potential conflicts or have the opportunity to "rais[e] the issue of religious accommodation" (Resp. Br. 46).

Respondent next expresses concern (Br. 52-53) that factfinders will consider objective circumstances in assessing whether an employer had, in fact, correctly understood a religious conflict. In view of this, respondent contends (Br. 53) Title VII's antidiscrimination protections should be curtailed lest employers feel the need "to become familiar with an infinite variety of religious practices * * * since a jury might later find that the employer must have (or should have) suspected the religious basis for the practice in question." This Court's precedents offer no support for the proposition that antidiscrimination protections should be limited to simplify jury factfinding (much less to avoid the proffered horrible that employers may "become familiar with * * * religious practices" as a precautionary measure). Judge or jury determinations about employers' mental states are a routine part of the inquiry in employment discrimination cases. Yet this Court has never curtailed antidiscrimination protections to avoid those inquiries, and it has rejected demands for special rules of proof in Title VII cases. See *Desert Palace, Inc.* v. *Costa*, 539 U.S. 90, 98-101 (2003) (rejecting requirement of "direct evidence" in mixed-motive cases).

Respondent also seeks to defend the court of appeals' "actual knowledge" holding on the ground (Br. 54-56) that it is more consistent with public policy objectives for an employer who lacks the certainty required by the Tenth Circuit to *refuse to hire* an applicant than to inquire further about a conflict. That suggestion is contrary to Title VII's objectives—protecting religious practice and encouraging dialogue regarding possible accommodation. See *Ansonia Bd. of Educ.* v. *Philbrook*, 479 U.S. 60, 69 (1986) (citation omitted).

Nor can respondent pin that approach on EEOC guidance because, as the EEOC has explained (Br. 30), it does not discourage employers perceiving a religious conflict from seeking to confirm whether such a conflict exists. Although "[q]uestions about an applicant's religious affiliation and beliefs" are "*generally* * * * non job-related," see EEOC, *Pre-Employment Inquiries and Religious Affiliation or Beliefs*, http://www.eeoc.gov/laws/practices/inquiries_religious.cfm (last visited Feb. 16, 2015) (emphasis added), such inquiries *are* "job-related" when they bear on whether an employee can comply with the employer's work rules, with or without a reasonable accommodation. Cf. *EEOC Compliance Manual* § 12-IV(A)(1), at 47 (encouraging employer to "ask the employee to explain the religious nature of the practice and the way in which it conflicts with a work requirement" when employer is skeptical of accommodation claim). In any event, an employer believing that an applicant's faith would conflict with a work rule need not inquire into the employee's faith to confirm or dispel the conflict. See EEOC Br. 30. It can simply advise the applicant of the relevant rule

and ask whether (and why) the applicant would have trouble complying. See *ibid.*

Finally, it is respondent's approach and not that of the EEOC that invites religious stereotyping. Cf. Resp. Br. 53-54. By creating a safe harbor for employers acting on their *inferences* about an applicant's religious conduct, respondent gives employers reluctant to accommodate religious practices every incentive to act on guesses and suspicions. This case illustrates that point. Respondent declined to hire Elauf not because respondent requires job applicants to be in compliance with its Look Policy during their interviews—respondent does not—but because it correctly inferred based on Elauf's hijab that she would need a religious accommodation in order to comply with the Look Policy in the future. A reading of Title VII that gives employers a free pass to act on religious stereotypes, so long as they do not confirm them, is not a sensible reading of the Act.

2. Section 703(a)(1) reaches a refusal to accommodate a religious practice that the employer correctly understands to be religious, whether or not the refusal is "based on the religious nature *of the practice"*

Unable to justify the Tenth Circuit's approach within the framework of existing law, respondent instead seeks to create diversion. Respondent asserts (Br. 33-34) that the prohibition on refusing to hire an applicant "because of" the applicant's "religious practice" under Section 703(a)(1) of Title VII reaches only refusals that are "based on the *religious nature* of the practice." Thus, respondent contends, an employer who deliberately refuses to hire an applicant based on the applicant's Sabbath observance or religious garb,

for instance, does not refuse to hire the applicant "because of" the applicant's "religious practice," if the employer would *also* have refused to hire a person who engaged in a similar, secular practice. *Ibid.*

This construction of Section 703(a)(1) was not raised at any point below. And respondent is incorrect to suggest that its failure to do so is justified because the EEOC has changed *its* theory. From the very start and through briefing in this Court, the EEOC has pursued the same theory: Respondent refused to hire Elauf "because of" religious practice when it failed to accommodate her practice of wearing a headscarf. Thus, the EEOC asserted below that respondent violated Section 703(a)(1) by refusing to hire Elauf "because of" religion—in particular, because of religious practice that respondent could accommodate without undue hardship. Compl. 2-3; EEOC Amended Mot. for Partial Summ. J. 16-17; EEOC C.A. Br. 21-22, 23-24. There has been no change in theory in this Court. See EEOC Br. 18-19, 22, 23.

Nothing in the EEOC's argument that failures to accommodate religious practice can be described as disparate treatment shifts the EEOC's underlying claim or suggests that EEOC has "abandoned" (Resp. Br. 18) its failure-to-accommodate claim. As the EEOC explained (Br. 23-24), this Court has used the term "disparate treatment" to refer to an employer's deliberate refusal to hire an applicant because of a protected characteristic. A failure-to-accommodate claim meets this definition, because it is an allegation that an employer refused to hire an applicant because of a protected characteristic—religious practice that

an employer could accommodate.[2] But whether "failure to accommodate" claims are assigned this label or not, the EEOC has consistently pressed, and continues to press, the same claim that respondent violated Title VII by refusing to hire Elauf "because of" a religious practice that it could accommodate without undue hardship. There is no change in position to justify respondent's failure to argue previously that a refusal to hire an employee is not "because of" religious practice if it is pursuant to a work rule that sweeps in religious and secular practices alike.

In any event, this argument is foreclosed by precedent, text, and history. As to precedent, respondent's approach cannot be squared with this Court's principal decision construing religious practice—or nearly four decades of decisions after that. In *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63 (1977), a discharged employee brought a claim under the provision of Title VII invoked in this case, Section 703(a)(1), whose sole command is that employers refrain from employment actions "because of" protected attributes, including (subject to a hardship exception) religious practice. *Id.* at 71. The employee asserted that he had been unlawfully discharged "because of" a religious practice that could have been accommodated without undue hardship—as necessary to trigger liability under Section 703(a)(1)—because he had been

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[2] Put another way, Congress wanted employees with religious practices that could be accommodated without undue hardship to be treated the same as employees who did not observe the religious practice. Here, for example, Elauf should be treated the same (absent undue hardship) as an applicant who did not wear a headscarf. Failure to accommodate thus *is* "disparate treatment" in the relevant sense.

discharged for Sabbath observance that conflicted with the employer's neutral, seniority-based scheduling policy. *Id.* at 68-69. In other words, the employee raised precisely the sort of claim that respondent contends is not discrimination "because of" a religious practice.

In addressing that claim, this Court squarely rejected respondent's construction of what it means to fire or refuse to hire an employee "because of" a "religious practice." It explained that claims that an employer failed to make an exception to a work rule reaching secular and religious practices alike *do* fall within Section 703(a)(1)'s prohibition. "The intent and effect of" the provision defining religion to include religious practice that could be accommodated, this Court explained, "was to make it an unlawful employment practice under § 703(a)(1) for an employer not to make reasonable accommodations, short of undue hardship, for the religious practices of his employees and prospective employees." *Hardison*, 432 U.S. at 74. Accordingly, the employer's liability turned exclusively on the undue-hardship exception. *Id.* at 75-85. That hardship inquiry would have been unnecessary if respondent were correct that employment actions based on rules sweeping in religious and non-religious practices are not "because of" religious practice at all. In the four decades since *Hardison*, federal courts have uniformly recognized that failure to accommodate religious practice is discrimination "because of" religious practice under Section 703(a)(1). See, *e.g.*, *Sanchez-Rodriguez* v. *AT&T Mobility P.R., Inc.*, 673 F.3d 1, 11-12 (1st Cir. 2012); *Baker* v. *Home Depot*, 445 F.3d 541 (2d Cir. 2006); *Protos* v. *Volkswagen of Am., Inc.*, 797 F.2d 129 (3d Cir.), cert. denied, 479

U.S. 972 (1986); *EEOC* v. *Ithaca Indus.*, 849 F.2d 116 (4th Cir.) (en banc), cert. denied, 488 U.S. 924 (1988); *David* v. *Fort Bend Cnty.*, 765 F.3d 480, 484-485 (5th Cir. 2014), petition for cert. pending, No. 14-847 (filed Jan. 15, 2015); *Smith* v. *Pyro Min. Co.*, 827 F.2d 1081, 1084-1085 (6th Cir. 1987), cert. denied, 485 U.S. 989 (1988); *EEOC* v. *Ilona of Hung., Inc.*, 108 F.3d 1569, 1574-1575 (7th Cir. 1997); *Brown*, 61 F.3d at 653-654; *Heller*, 8 F.3d at 1437-1438; *Thomas* v. *National Ass'n of Letter Carriers*, 225 F.3d 1149, 1154-1155 (10th Cir. 2000); *Beadle* v. *City of Tampa*, 42 F.3d 633, 636 (11th Cir.), cert. denied, 515 U.S. 1152 (1995).

This construction follows from the statutory text. Respondent's theory that an employee is dismissed "because of" religious practice only if the employer acts based on the religiosity of the practice is contradicted by Congress's inclusion of a hardship exception in the definition of protected "religious practice." See 42 U.S.C. 2000e(j) (religion includes religious practice "unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business"). That exception would be unnecessary if acting because of "religious practice" meant singling out practices based on their "*religious nature*" (Resp. Br. 34), because it cannot cause "undue hardship" to refrain from treating some employees less favorably based simply on the religious faith underlying their conduct.

Finally, respondent's understanding is contrary to the history of Title VII's religious-practice protection. As this Court has recognized, *Hardison*, 432 U.S. at 73, 74 n.9, and respondent concedes (Br. 36-37), the

purpose of the amendment providing protection against employment decisions based on "religious practice" was to bar dismissals based on policies that sweep in religious and secular practices alike—not policies that single out religious persons "based on the *religious nature* of the practice," Resp. Br. 34. The "religious practice" protection was enacted after the EEOC and some courts divided over whether employers who dismissed Sabbath observers because they could not comply with generally applicable scheduling rules had engaged in religious discrimination. Compare 29 C.F.R. 1605.1 (1968) (concluding that employers discriminate based on religion if they fail to afford reasonable accommodations) with *Dewey* v. *Reynolds Metals Co.*, 429 F.2d 324, 329-331 (6th Cir. 1970) (rejecting that approach), aff'd by an equally divided court, 402 U.S. 689 (1971) (per curiam); *Riley* v. *Bendix Corp.*, 330 F. Supp. 583, 589-590 (M.D. Fla. 1971) (same), rev'd, 464 F.2d 1113 (5th Cir. 1972).

To resolve that debate, Congress clarified that an employer acts unlawfully when it denies employment based on religious practice that the employer could accommodate without undue hardship—even when the employer would also deny employment to an applicant engaged in similar, secular conduct. See 118 Cong. Rec. 705-706 (1972); *id.* at 4940; *Hardison*, 432 U.S. at 73, 74 n.9 (noting that Congress sought to "resolve by legislation" the issue in *Dewey* and *Riley* and to "requir[e] some form of accommodation"). Given this purpose, it makes no sense to read the amendment, as respondent would (Br. 34), as aimed at decisions motivated by the "religious nature of the practice."

Respondent's bid to overturn nearly four decades of precedent allowing accommodation claims under

Section 703(a)(1) would significantly curtail protection of religiously observant employees. The disparate-impact protections that would remain under Section 703(a)(2) are no substitute for the long-established protections under which individual employees can seek accommodation without statistical proof pertaining to the effects of an employer's practices on protected groups. Section 703(a)(2) is a poor fit for such individuals' claims: It is directed not at particular hiring decisions, but at broad employment practices. Compare 42 U.S.C. 2000e-2(a)(1) (making it unlawful "to fail or refuse to hire or to discharge any *individual*" based on protected attributes) (emphasis added) with 42 U.S.C. 2000e-2(a)(2) (making it unlawful "to limit, segregate, or classify [employer's] employees or applicants" in prohibited ways). And it requires not simply proof as to the effect of an employer's rules on a particular employee, but rather evidence that the employer's practices had "significant adverse effects on [a] protected *group*[]." *Watson* v. *Fort Worth Bank & Trust*, 487 U.S. 977, 986-987 (1988) (discussing *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971)); see also, *e.g.*, *Washington* v. *Davis*, 426 U.S. 229, 246-247 (1976) (requiring "substantially disproportionate" impact on protected group). This traditionally requires evidence of "statistical disparities, rather than specific incidents," *Watson*, 487 U.S. at 987—evidence that individual applicants seeking accommodations are unlikely to have, and evidence that might not even be sensible to seek when an applicant's religious practice reflects beliefs that are sincerely held but idiosyncratic. In short, respondent's reading of Section 703(a)(1) is contrary to text and precedent—and would dramat-

ically undercut longstanding religious-practice protections.

B. Respondent Is Not Entitled To Relief Based On A Newly Minted Challenge To Damages Under 42 U.S.C. 1981a

Respondent next urges this Court to decide this case by accepting yet another claim it advances for the first time in this Court: compensatory damages under 42 U.S.C. 1981a(a)(1) are unavailable for religious-accommodation claims. That argument is forfeited. In any event, it lacks merit.

1. Respondent has forfeited this claim

This Court's general rule is that it will not decide an issue raised by a respondent in its merits brief that was neither presented nor decided below nor raised in the brief in opposition to certiorari. See, *e.g.*, *Goodyear Dunlop Tires Operations, S.A.* v. *Brown*, 131 S. Ct. 2846, 2857 (2011). Respondent's belated assertion that the EEOC's religious-discrimination claim in this case was not one of "intentional discrimination" under Section 1981a(a)(1) is forfeited under these principles.

The only justification respondent offers for waiting until its merits brief in this Court to raise this claim is an assertion that respondent had no reason previously to challenge the availability of compensatory damages under Section 1981a. This suggestion is mystifying. The EEOC has asserted throughout this case that it was entitled to compensatory damages under 42 U.S.C. 1981a—a remedy available only for claims of "intentional discrimination," 42 U.S.C. 1981a(a)(1). See Compl. 1, 3-4 (D. Ct. Doc. 2). The EEOC also demanded a jury trial, which is available only for claims of intentional discrimination, 42 U.S.C.

1981a(c). See Compl. 4. For good measure, the EEOC explicitly described its claim as one of "intentional" discrimination. *Id.* at 3.

Despite the EEOC's clear position, respondent never challenged the EEOC's right to a jury trial and compensatory damages under Section 1981a. To the contrary, respondent prepared jury instructions and made motions in limine premised on the availability of Section 1981a(a)(1) damages. See Def.'s Requested Jury Instructions (D. Ct. Doc. 145) 4-5, 6-10 (proposing jury instructions regarding availability of compensatory and punitive damages); Def.'s Mot. in Limine to Exclude Evidence of Punitive Damages 3-9 (D. Ct. Doc. 51) (litigating whether the EEOC could establish entitlement to punitive damages under standards in Section 1981a). Then, after the jury awarded compensatory damages, respondent raised no Section 1981a issue on appeal. For good measure, respondent failed to mention a Section 1981a-based defense in its brief in opposition to certiorari.

This case implicates with unusual strength the interests underlying this Court's rules concerning claims outside the question presented. Respondent has "forfeited" its claim at every stage. *United States* v. *Jones*, 132 S. Ct. 945, 954 (2012) (citing *Sprietsma* v. *Mercury Marine*, 537 U.S. 51, 56 n.4 (2002)). As a result, no court has considered or passed upon respondent's Section 1981a(a)(1) argument. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) (noting Court is a "court of review, not of first view"). And because respondent failed to even give notice of this argument in its brief in opposition to certiorari, neither the EEOC nor amici had a fair opportunity to discuss Section 1981a prior to this reply brief. See

South Cent. Bell Tel. Co. v. *Alabama*, 526 U.S. 160, 171 (1999).

2. Respondent's construction lacks merit

In any event, respondent's claim lacks merit. Since the enactment of Section 1981a, an employer's deliberate refusal to hire an employee because of religious practice that it could reasonably accommodate has been uniformly considered "intentional discrimination" under Section 1981a(a)(1). That understanding has been so widely shared that, while EEOC has routinely sought jury trials and compensatory damages in cases involving religious-accommodation claims, only a pair of defendants appear to have questioned whether such claims pertain to conduct that is "intentional"—and those challenges were swiftly rejected. *EEOC* v. *ABM Sec. Servs.*, No. 12-cv-4075 (E.D. Pa. Mar. 21, 2013); *Vetter* v. *Farmland Indus., Inc.*, No. C94-3008, 1996 WL 33423409, at *2 (N.D. Iowa Sept. 17, 1996); see *EEOC* v. *Union Independiente de la Autoridad de Acueductos y Alcantarillados de Puerto Rico*, 279 F.3d 49, 57 n.9 (1st Cir. 2002) (noting EEOC's "usual practice" in religious-accommodation cases of seeking jury trial). Meanwhile, jury verdicts and compensatory damage awards concerning such claims have been regularly upheld. See, *e.g.*, *id.* at 57; *Sturgill* v. *United Parcel Serv., Inc.*, 512 F.3d 1024, 1033 (8th Cir. 2008).

The reason is plain. Section 1981a permits compensatory damages against (among others) a respondent who "engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703." Section 703(a)(1) of Title VII, under

which this suit was brought, is an "intentional discrimination" provision. *Ricci*, 557 U.S. at 577; see EEOC Br. 23-24.

Disparate-impact claims are conceptually distinct causes of action set forth in a different portion of the statute. Disparate-impact claims derive from Section 703(a)(2)'s bar on practices that "limit, segregate, or classify * * * applicants for employment in any way which would * * * adversely affect his status as an employee, because of" the protected characteristics, 42 U.S.C. 2000e-2(a)(2), since this language—unlike the language of Section 703(a)(1)—"focuses on the *effects* of the action on the employee rather than the motivation for the action of the employer." *Smith* v. *City of Jackson*, 544 U.S. 228, 235 & n.6 (2005) (plurality opinion); *id.* at 243-247 (Scalia, J., concurring in the judgment); see also *Watson*, 487 U.S. at 991.[3] Further, disparate-impact protections have expansive contours that respondent does not embrace: A hallmark is that an employer can violate them without knowledge or intent, simply because the effect of an employer's practice was to disadvantage a protected group. See, *e.g.*, *Griggs*, 401 U.S. at 432-433; see also 42 U.S.C. 2000e-2(k) (codifying disparate-impact protections). Revealingly, while respondent seeks to apply the label of "disparate impact" to the religious-practice claim that the EEOC has raised under Sec-

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[3] Contrary to respondent's suggestion (Br. 41), the government's amicus brief in *Texas Department of Housing & Community Affairs* v. *Inclusive Community Project, Inc.*, No. 13-1371 (argued Jan. 21, 2015), reflects this understanding of the source of disparate-impact protection under Title VII. See *id.* at 19 (noting disparate-impact protection is under "Section 703(a)(2) of Title VII").

tion 703(a)(1), respondent's account of the contours of Section 703(a)(1) does not correspond to disparate-impact liability at all. Rather than holding employers accountable for failure to accommodate religious practice under Section 703(a)(1) regardless of whether the employer understood the nature of the practice, respondent would require "actual knowledge" based on explicit verbal notice. This is disparate-impact liability in name only.

In defense of its novel approach, respondent invokes (Br. 25-26) *Employment Division* v. *Smith*, 494 U.S. 872 (1990). This is perplexing. *Smith* established that the Free Exercise Clause of the First Amendment does not generally require that States accommodate religious practice through exceptions to generally applicable laws. But Title VII's prohibition on employment decisions based on "religious practice" *does* require employers to accommodate religious practice through exceptions to generally applicable work rules. Title VII goes beyond what the Free Exercise Clause requires—as *Smith* recognized legislatures might do. *Id.* at 890.

Respondent is equally mistaken in suggesting (Br. 24-25) that dicta in *Hardison* establish that a refusal to accommodate religious practice cannot qualify as intentional discrimination. *Hardison* established that Title VII's intentional-discrimination provision does reach the firing of an employee based on religious practice that could be accommodated without undue hardship. See 432 U.S. at 77-81. Its later discussion of intentional discrimination concerned the meaning of a separate defense. Under Section 703(h), even a hiring decision that would otherwise be barred is not actionable if it arises from the application of a seniori-

ty system not itself designed with a discriminatory purpose. See *id.* at 82 (suggesting Section 703(h) would be applicable in *Hardison* because employer's "seniority system was not designed with the intention to discriminate against religion"). *Hardison*'s discussion of Section 703(h) simply reflects that some deliberate refusals to accommodate religious practice otherwise banned as intentional discrimination are saved because they are the product of seniority systems designed with no such discriminatory intent.

Respondent next points to lower court decisions (Br. 26-27) that describe "religious accommodation claims" as distinct from "intentional discrimination" claims. It is unsurprising that some courts have developed a separate label for religious-accommodation claims, because such claims involve questions of proof concerning notice and the feasibility of accommodation that are not present in other cases under Section 703(a)(1). But these courts' application of a unique label to accommodation claims does not shed light on the classification of those claims under Section 1981a(a)(1)—which divides all Title VII claims into the categories of "intentional discrimination" and "disparate impact" discrimination. 42 U.S.C. 1981a(a)(1). Respondent has identified no court which has described an accommodation claim as a claim of "disparate impact." On the contrary, as noted above, courts and litigants applying Section 1981a(a)(1) have for decades understood that accommodation claims fall into the "intentional discrimination" category. That consensus is correct because, unless the undue-hardship exception applies, an employer who refuses to hire an employee based on what it correctly understands to be a religious practice has intentionally

denied employment based on an attribute protected under Title VII.[4]

Finally, respondent suggests (Br. 28-29) that this uniformly accepted approach creates illogical differences between the treatment of religious accommodation under Section 1981a(a)(1) and the treatment of disability accommodation under Section 1981a(a)(2). Respondent notes that disability-accommodation claims are subject to a limited good-faith defense, and religious-accommodation claims are not. See 42 U.S.C. 1981a(a)(3). In fact, however, it is respondent's approach that would generate inexplicable asymmetries. Congress's choice to limit the good-faith provision is readily explained by the more onerous and

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[4] Similarly, as respondent notes (Br. 30), the EEOC has often used the term "disparate treatment" in a manner narrower than this Court, to connote only one species of intentional discrimination. This Court's decisions have generally treated "disparate treatment" as synonymous with "intentional discrimination," explaining that disparate treatment "occur[s] where an employer has 'treated [a] particular person less favorably than others because of' a protected trait." *Ricci*, 557 U.S. at 577 (citation omitted); see also *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 335 n.15 (1977). In contrast, like some lower courts, the EEOC has sometimes used the term "disparate treatment" more narrowly, distinguishing it from other species of intentional discrimination, such as harassment, retaliation, and denial of accommodation. See *EEOC Compliance Manual* § 12-II, at 21. These finer divisions are of little relevance under Section 1981a(a)(1), with its bipartite division of all discrimination claims. EEOC has distinguished accommodation claims from disparate-impact claims. See *id.* at 21 n.56 (contrasting "reasonable accommodation/undue hardship" claims with "disparate impact analysis"). And as noted *infra*, EEOC has for many decades treated accommodation claims as triggering the jury trial right and damages remedies available only for "intentional discrimination" under Section 1981a.

complex accommodation duties under the Americans with Disabilities Act of 1990, 42 U.S.C. 12101 *et seq.* Compare 42 U.S.C. 12111(10) (setting out multi-factor test for "undue hardship"), with *Hardison*, 432 U.S. at 84 (concluding that undue hardship exception applies to religious accommodations if employer would "bear more than a *de minimis* cost"). In contrast, respondent offers no explanation for the starker difference on its view—employees making disability-accommodation claims are able to obtain compensatory damages, while those raising religious-accommodation claims are denied that remedy uniformly. For all these reasons, respondent's forfeited claim lacks merit.

C. The Decision Below Should Be Reversed

Under the correct standard, the EEOC was entitled to partial summary judgment as to respondent's notice here. Each relevant witness agreed that assistant manager Heather Cooke "had responsibility for hiring decisions at the Abercrombie Kids store." Pet. App. 117a n.10 (district court at summary judgment); J.A. 53-56, 101, 133. And Cooke acknowledged that she "fail[ed] or refuse[d] to hire" Elauf, 42 U.S.C. 2000e-2(a)(1), because of a hijab that Cooke correctly understood reflected Elauf's religious practice. J.A. 77, 90-91.

Respondent notes that Cooke would consult with others when she was unclear about respondent's policies, see J.A. 55-56, and that when she did so here, district manager Randall Johnson told her that headscarves were prohibited and that employees could not be hired if they were out of compliance, see J.A. 134 (Johnson); see also J.A. 87-90 (Cooke). But the fact that Cooke, against her own better judgment, did not

hire Elauf because she understood that she had to adhere to respondent's Look Policy simply underscores the reasons for respondeat superior liability in cases like this. It certainly does not undercut the undisputed testimony that it was "solely" Cooke who had the authority to extend or refuse job offers for sales positions, and that Cooke refused to extend an offer here because of what she correctly understood to be a religious practice. J.A. 133; see also J.A. 55 (Cooke made "the final decision on whether an applicant for a model position would be hired"). Accordingly, the EEOC was entitled to summary judgment concerning the notice element of its claim.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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Solicitor General

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